

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 03-0098

Cir. Ct. No. 01CV000246

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**TATUM SMAXWELL, A MINOR, TANYA SMAXWELL AND
GREG SMAXWELL,**

PLAINTIFFS-APPELLANTS,

V.

**MELVA BAYARD, MANITOWOC COUNTY AND EMPLOYERS
HEALTH INSURANCE COMPANY,**

DEFENDANTS,

**GLORIA THOMPSON AND HERITAGE MUTUAL INSURANCE
COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Manitowoc
County: PATRICK L. WILLIS, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 SNYDER, J. Tatum Smaxwell, a minor, and her parents, Tanya Smaxwell and Greg Smaxwell (collectively, the Smaxwells), appeal from a summary judgment dismissing their negligence action against Gloria Thompson and her insurer, Heritage Mutual Insurance Company (Heritage Mutual). Tatum was seriously injured by a dog owned by a tenant of Thompson's; the Smaxwells sued Thompson for negligence but the circuit court dismissed Thompson from the action upon summary judgment, concluding Thompson's actions, even if negligent, could not form the basis for liability under Wisconsin law. We agree and therefore affirm the summary judgment.

FACTS

¶2 At all times relevant to this decision Thompson owned two parcels of property located on County Trunk Highway CR in Manitowoc county. The larger of the two parcels, consisting of 2.91 acres, included Thompson's residence as well as a former motel property converted into apartments. Three of these apartment units were occupied in June 1999. Melva Bayard and Richard Hines rented one of these apartments. Thompson's daughter, Tanya Smaxwell, lived in another of the units with her children, Darion, Tatum and Jayme. Nicole Klein, another of Thompson's daughters, occupied a third apartment with her children, Nick and Rochelle.

¶3 Thompson owned a second smaller parcel of land behind this first parcel. Although she did not charge any additional rent, since the early 1990s Thompson had allowed Bayard to house some of her dogs on this parcel. Thompson did not know the exact number of dogs Bayard kept on the property but was aware there were a number of dogs, including wolf hybrids. Thompson was also aware that law enforcement personnel had made several visits to Bayard

about the dogs and that one of the dogs had bitten a police officer. Thompson had received a citation about the dogs in 1996, although the result of that citation is unclear. Thompson took no active role in caring for the dogs and, in fact, had not even viewed the conditions under which the dogs were housed since the mid-1990s.

¶4 It is undisputed there was a long history of complaints from neighbors to the Manitowoc County Sheriff's Department prior to the incident at hand and that Thompson was aware of many complaints. The complaints date back to 1992 and total more than seventy in number. In a number of complaints, neighbors reported dogs running at large or expressed fear based on threatening and vicious wolf hybrid-looking dogs. A sheriff's report from August 29, 1992, indicates a sheriff's officer was bitten by a German shepherd owned by Bayard. In December 1995, a caller indicated the dogs had killed his pigeons. In 1999, Bayard admitted some of her own puppies had been killed by the dogs.

¶5 On the morning of June 15, 1999, Tanya Smaxwell was visiting Thompson's house with her three-year-old daughter Tatum and her infant son Jayme. Klein and her children were also present. As the three adults were preparing to drink coffee on the porch, Tatum was allowed to go outside with five-year-old Nick, who offered to watch her. Before the adults got outside, Nick returned to the house, screaming that the dogs had gotten Tatum. Three of Bayard's wolf hybrid dogs, each weighing approximately seventy-five pounds, were on top of Tatum, attacking her. Thompson and Tanya succeeded in getting Tatum away from the dogs but not before Tatum sustained serious injury. The dogs were loose because Bayard had forgotten to close the latch to their kennel the previous night.

¶6 On July 2, 2001, the Smaxwells brought this action against Bayard, Thompson, Heritage Mutual and Manitowoc County for negligence. Bayard did not respond to the summons and complaint and has not appeared in this case. Thompson denied liability and on March 8, 2002, she filed a motion for summary judgment. The circuit court granted Thompson's motion for summary judgment, concluding that her conduct, even if negligent, could not form the basis for liability under current Wisconsin law. The Smaxwells appeal.

DISCUSSION

¶7 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). That methodology is well known and need not be repeated here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; WIS. STAT. § 802.08(2) (2001-02).¹ Because there are no material facts at issue in this case, we must determine which party is entitled to judgment as a matter of law. *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 501-02, 577 N.W.2d 617 (1998).

¶8 In order to constitute a cause of action for negligence, there must exist (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the plaintiff's injury; and (4) an actual loss or damage as a result of injury. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶28, 241 Wis. 2d 804, 623 N.W.2d 751. The

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Smaxwells argue that, as a landlord, Thompson had a duty to avoid exposing persons on her property to an unreasonable risk of harm and a duty to protect or warn her guests of the risks posed by known dangerous animals on her property. We disagree. A landlord is not liable on common law negligence grounds for the acts of a tenant's dog.

¶9 The facts at hand are remarkably similar to those of *Gonzales v. Wilkinson*, 68 Wis. 2d 154, 227 N.W.2d 907 (1975), and *Malone v. Fons*, 217 Wis. 2d 746, 580 N.W.2d 697 (Ct. App. 1998). In *Gonzales*, a young child wandered onto a neighboring tenant's property and was attacked and bitten on the head by the tenant's dog. *Gonzales*, 68 Wis. 2d at 155. The plaintiffs sought to impose liability on both the tenant and the landlord under a claim of maintaining an attractive nuisance. *Id.* The Wisconsin Supreme Court, reviewing only the claim against the landlord, held that the attractive nuisance doctrine was unavailable to the plaintiffs. *Id.* at 157. The *Gonzales* majority concluded that "the ownership and control of the premises created no duty on the part of the owner of the premises to the plaintiffs." *Id.* at 158.

¶10 In *Malone*, an eight-year-old girl was bitten and sustained serious injury by a tenant's dog while in a driveway adjacent to the tenant's residence, a residence owned by the landlord Fons. *Malone*, 217 Wis. 2d at 750. The Malones sued Fons, alleging both common law negligence and strict liability under WIS. STAT. § 174.02. *Malone*, 217 Wis. 2d at 751. We rejected the Malones' arguments, acknowledging the holding of *Gonzales*. *Malone*, 217 Wis. 2d at 753-55. We concluded that the *Gonzales* court's ultimate holding was that a landlord, who is not an owner or keeper of a tenant's dog and who does not exercise dominion and control over the dog, is not liable on common law negligence grounds for the acts of the dog. *Malone*, 217 Wis. 2d at 755.

¶11 This rule is also consistent with cases concerning nonlandlord-related common law negligence dog bite claims and with the jury instruction covering the common law liability of the owners or keepers of animals. *Id.* at 755-56. Both hold that only an owner or a keeper of an animal can be held liable for common law negligence. *Id.* at 756. *Gonzales* simply extended the common law rule to a landlord-tenant situation. *Malone*, 217 Wis. 2d at 757. A landlord is normally neither an owner nor a keeper of his or her tenant's dogs nor does a landlord usually exercise any control over those dogs. *Id.* Hence, a landlord is not liable under the common law for any injuries caused by a tenant's dog. *Id.* Thus, according to the plain language of *Gonzales* and *Malone*, Thompson is not liable on common law negligence grounds for the dog bites inflicted upon Tatum by the tenant's dogs. *See id.*

¶12 The Smaxwells argue that their claims are not precluded by *Gonzales* or *Malone* because public policy favors the *Pattermann v. Pattermann*, 173 Wis. 2d 143, 496 N.W.2d 613 (Ct. App. 1992), standard for landowner liability in dog bite cases. The Malones made nearly identical arguments to those offered by the Smaxwells, arguments that we firmly rejected. According to the plain language of *Gonzales* and now *Malone*, a landlord is not liable, on common law negligence grounds, for dog bites received from a tenant's dog and neither *Pagelsdorf v. Safeco Ins. Co. of America*, 91 Wis. 2d 734, 284 N.W.2d 55 (1979), nor *Pattermann* has modified this holding. *Malone* expressly acknowledged the holdings of both *Pattermann* and *Pagelsdorf* and rejected them both.

¶13 In *Malone*, we concluded that *Pattermann* did not represent a shift in the law of *Gonzales*. We observed that the *Pattermann* facts were markedly different from the *Malone* facts. *Malone*, 217 Wis. 2d at 758. In *Pattermann*, the Pattermann family gathered at Sallie Pattermann's home in preparation for a

family reunion. *Pattermann*, 173 Wis. 2d at 148. Scott Pattermann and his family arrived from Florida with their dog. Sallie allowed the dog to be placed in a hallway, and shortly thereafter, Erin Pattermann, another guest, arrived. *Id.* When Erin bent down to pet the dog, the dog jumped up and bit her in the face. *Id.* The plaintiff's complaint alleged common law negligence and strict liability claims under WIS. STAT. § 174.02 against Sallie. *Pattermann*, 173 Wis. 2d at 148-49. We stated that a "landowner ... may be liable for negligence associated with a known dangerous dog allowed on [his or] her premises." *Id.* at 151.

¶14 Like the Malones, the Smaxwells pounce on this statement and argue they meet the *Pattermann* requirements for common law negligence in Wisconsin. See *Malone*, 217 Wis. 2d at 758. However, as we acknowledged in *Malone*, although *Pattermann* did involve a dog bite and a property owner, nowhere in the case is there a discussion of the duties of a landlord. *Malone*, 217 Wis. 2d at 758. We therefore found the suggestion that the *Pattermann* court intended its holding to apply to landlords speculative at best. *Malone*, 217 Wis. 2d at 758-59. In addition, we further concluded that *Pattermann* cannot be read to allow common law negligence claims against landlords for injuries caused by dangerous dogs on their premises because such a holding would expressly conflict with the supreme court's prior holding in *Gonzales*. *Malone*, 217 Wis. 2d at 759. We have no authority to overrule, modify or withdraw language of a supreme court decision. *Id.*² We concluded that *Pattermann* did not overrule or modify the *Gonzales*

² The Smaxwells also argue that we "failed to effectively distinguish *Pattermann*" in *Malone*. While we, of course, disagree with this conclusion, *Malone* remains a valid, unreversed opinion and we have no authority to overrule, modify or withdraw language from our previous decisions. *Cook v. Cook*, 208 Wis. 2d 166, 185-90, 560 N.W.2d 246 (1997).

holding that a landlord is not liable under the common law for any injuries caused by a tenant's dog.

¶15 We further concluded in *Malone* that *Pagelsdorf*, another case relied upon by the Smaxwells, was limited to situations dealing with property maintenance and property defect issues, not dog bite claims. In *Pagelsdorf*, the plaintiff, a neighbor, was injured when a rotted railing collapsed due to the landlord's failure to maintain the premises. *Pagelsdorf*, 91 Wis. 2d at 735-37. As we noted in *Malone*, *Pagelsdorf* was not a dog bite case but broke new ground and set a new standard for landlords in the maintenance of their rental property. *Malone*, 217 Wis. 2d at 759. *Pagelsdorf* adopted a rule that a landlord is under a duty to exercise ordinary care in the maintenance of the premises. *Pagelsdorf*, 91 Wis. 2d at 741; *Malone*, 217 Wis. 2d at 760. In *Malone*, we concluded that *Pagelsdorf*'s rule is limited to situations dealing with property maintenance issues and defects on the premises and thus did not overrule *Gonzales*'s rule regarding dog bites. *Malone*, 217 Wis. 2d at 760.

¶16 Thus, in the similar factual situation of *Malone*, we addressed and rejected nearly identical arguments to those advanced by the Smaxwells here. We see no reason why the same logic should not apply here. Thompson, as a landlord, cannot be held liable under common law negligence grounds for the acts of her tenant Bayard's dogs.

¶17 The Smaxwells argue that despite the aforementioned cases contradicting their cause of action, public policy favors the *Pattermann* standard for landowner liability in dog bite cases, arguing that "[t]he time has come for all Wisconsin Courts to recognize that dog owners should not be the only parties responsible for protecting citizens from the risks posed by known dangerous

animals.” However, as we have stated so many times in the past, we are bound by the law as it exists; we have no authority to overrule, modify or withdraw language of another court of appeals decision or a supreme court decision. *Malone*, 217 Wis. 2d at 759. We are an error-correcting court; public policy considerations are not for us to determine but are considerations to be addressed by the Wisconsin Supreme Court. See *State v. Schumacher*, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988).

CONCLUSION

¶18 We agree with the circuit court that Thompson’s actions, even if negligent, could not form the basis for liability under Wisconsin law as a landlord cannot be liable under the common law for any injuries caused by a tenant’s dog. We therefore affirm the summary judgment.

By the Court.—Judgment affirmed.

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